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79-1712

# In the Supreme Court of the United States

OCTOBER TERM, 1979

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO,
Petitioners,
vs.
REID BURTON CONSTRUCTION, INC., a Colorado Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## REPLY BRIEF TO BRIEF IN OPPOSITION

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| CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO, | ) |
| Petitioners, | ) |
| vs. | ) |
| REID BURTON CONSTRUCTION, INC., a Colorado Corporation, | ) |
| Respondent. | ) |

The Petitioners, Carpenters District Council of Southern Colorado and Local Union 1340 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO [hereinafter, District Council and Local 1340], respectfully submit the following reply brief to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

## REPLY ARGUMENT

### BURTON'S ANALYSIS IN ITS OPPOSITION BRIEF IS SUPERFICIAL AND FAILS TO ADDRESS THE FUNDAMENTAL QUESTIONS HEREIN: (1) WHETHER THE BASES FOR THE COURT OF

APPEALS' FINDING OF CONSTRUCTIVE WAIVER HAVE ANY SUPPORT IN PRECEDENT OR LOGIC, AND (2) WHETHER THIS COURT SHOULD ESTABLISH THE PARAMETERS OF THE CONSTRUCTIVE WAIVER DOCTRINE IN §301 ACTIONS.

In its brief opposing the Petition for a Writ of Certiorari, the Respondent, Reid Burton Construction, Inc. [hereinafter, Burton], argues that (1) the clearly erroneous standard under Fed.R.Civ.P. 52 obtained as to the District Court's findings and (2) the Court of Appeals' decision does not conflict with any decisions of other courts of appeals. This reply will address only the second of these arguments in detail.[1]

## I.

As stated in the Petition, the Court of Appeals' affirmance was predicated on three bases: (1) Denial by Local 1340 of party status under the collective bargaining agreement; (2) active participation in the various pre-trial aspects of the litigation; and (3) assertion of the arbitration provision as an affirmative defense without insisting "immediately" that the action be stayed pending arbitration. Each of the bases is analytically distinct, and the Petition addressed them separately. Burton's opposition brief, however, fails to respond in any

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[1]Burton's argument as to the applicability of the clearly erroneous standard is that, because the "Unions' conduct in pleading" was at issue in the remand, the District Court's determination was dependent upon the facts of the case. Opposition Brief at 8, 10. That analysis, however, ignores that the clearly erroneous standard applies only to findings of fact and that there were no issues of controverted fact below. Rather, virtually all relevant facts were contained in the various pleadings. Thus, as stated in note 3 of the Petition, this a "paper case" which presents the issue of what legal standard should be applied to uncontroverted facts. The District Court's conclusory finding of waiver, premised on an unarticulated legal standard, is not entitled to appellate deference under Rule 52.

meaningful fashion to the Petition's analysis but, instead, merely contends that the Court of Appeals, "in keeping with [the] long standing policies and the standards" of other circuits, correctly found waiver because the District Council and Local 1340 did not request "arbitration at the outset, as was their duty." [Opposition Brief at 13]

Aside from the Court of Appeals' decision herein, there is no decision which requires a defendant, so as to preserve an arbitration defense properly raised and consistently maintained, to move immediately for a stay pending arbitration. Such a rule, otherwise inconsistent with the liberal pleading policies of Rule 8(e),[2] is a glaring example of form displacing substance. Quite obviously, the very purpose of pleading the arbitration defense is to bring the opposing party's attention to an alleged obligation to exhaust contractual methods of dispute resolution before commencement of a civil action. Whether the opposing party chooses to exhaust those methods is, nonetheless, its own decision. There is accordingly no obligation for a defendant, such as the District Council or Local 1340, to initiate grievance or arbitration proceedings as to a plaintiff's contractual dispute. As stated in the Petition, various decisions have recognized this self-evident notion.[3]

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[2]See generally 2A J. MOORE, FEDERAL PRACTICE §§8.31[2], 8.32 (2d ed. 1979); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§1281-84 (1969).

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[3]*Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 70 F.2d 297, 299 (2d Cir. 1934), *aff'd*, 293 U.S. 449 (1935); *Kulukundis Shipping Co. S/A v. Amtorg Trading*, 126 F. 2d 978, 989 (2d. Cir. 1942); *Martin Marietta Aluminum, Inc. v. General Electric Co.*, 586 F.2d 143, 146 (9th Cir. 1978). Burton attempts to distinguish these decisions upon various, alleged factual differences. Opposition Brief at 12n.3. However, even if one assumed that Burton correctly identified factual differences, those differences are not material to the question of whether the District Council and Local 1340 had an affirmative obligation to request arbitration of Burton's dispute, except as to *Martin Marietta*. That decision, Burton states, is inappropriate because the contract "specifically *relieved* the defendant of *any* obligation to request arbitration." *Ibid.* (Cont'd)

The imposition of a duty to demand arbitration immediately may also mandate an essentially futile exercise. Instantly, Burton denied its obligation to arbitrate the issue of whether the no-strike provision had been violated. Evidence was taken on this issue during trial, and Burton appealed the District Court's decision on such point. [Petitioners' Appendix A at A-10-11 (District Court Memorandum Opinion (November 17, 1974); Petitioners' Appendix B at B-4-8 (Court of Appeals Opinion (May 6, 1976)] Thus, aside from satisfying an arbitrary requirement first enunciated five and half years after the litigation commenced, immediately demanding arbitration would seemingly have served no purpose.[4]

## II.

Burton's Opposition Brief virtually ignores a specific response to those portions of the Petition dealing with the Court of Appeals' reasoning as to predicating waiver on Local 1340's denial of "party" status and the Petitioners' active participation in pre-trial preparation. As developed in the Petition, the Court of Appeals' conclusion that waiver of the arbitration defense occurred through Local 1340's initial denial of §301 jurisdiction is inconsistent both with the Federal Rules of Civil Procedure and with *Controlled Sanitation*. Burton's only response

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[3](cont'd) (emphasis in original). A review of the relevant contractual language, though, indicates only that the aggrieved party was responsible for initiating the arbitration process. 586 F.2d at 145. Article XIV of the Building Construction Agreement herein similarly required the "aggrieved party" to refer a dispute to a board of adjustment, which board must hear a grievance before it is processed to arbitration. Petitioners' Appendix D at D-1. The board, in turn, is responsible for selecting an impartial chairman to serve as the arbitrator.

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[4]The Court of Appeals' reasoning is, of course, dependent upon viewing as a nullity the timely assertion of the arbitration defense and its consistent reiteration in various pre-trial pleadings. See Petition at 14n.5. Nonetheless, there is no legal or logical basis for such view. See *Controlled Sanitation Corp. v. Machinists District 128*, 524 F.2d 1324, 1328n.3 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976).

to this position is a quotation from the Court of Appeals' attempt at distinguishing *Controlled Sanitation*. [Opposition Brief at 11] Significantly, the Court of Appeals' only basis for distinguishing *Controlled Sanitation* was that the defendants therein "clearly reserved the right that the dispute should be submitted to arbitration" if a binding collective bargaining agreement was found. For those reasons noted above, however, the Court of Appeals' reasoning concerning the purported obligation to demand arbitration immediately is specious, and its effort to distinguish *Controlled Sanitation* must, therefore, fail.

Nothing in the Opposition Brief responds to the Petition's analysis of the Court of Appeals' conclusion that active participation in a civil action may result in wavier of an arbitration defense. Nonetheless, as stated in note 15 of the Petition, Burton had available to it various procedural devices, including a motion to strike and a motion for protective orders, to obviate any alleged prejudice flowing from the use of the discovery procedures not available in arbitration. Moreover, mere use of discovery in preparation for trial, when the arbitration defense has been properly preserved, can hardly be viewed as inconsistent with such defense – espcially where the substantive scope of the arbitration provision's coverage is challenged. Such a *per se* waiver rule would force litigants to risk either waiver of the arbitration defense or inadequate trial preparation and is diametrically opposed to modern pleading practices. It is hardly logical to permit defendants to raise and maintain multiple affirmative defenses but, simultaneously, to find one of those defenses constructively waived by pre-trial preparation as to other defenses or claims. Certainly, there is no question herein that the District Council or Local 1340 intentionally abandoned the arbitration defense, and, absent intentional abandonment, application of a constructive waiver doctrine

predicated, at least in part, upon active pre-trial preparation is manifestly inappropriate.

## III.

Lastly, it must be underscored that the Court of Appeals' decision raises an important, and yet unresolved, question as to when constructive waiver of the arbitration defense is appropriate in §301 actions. As stated in the Petition, a central policy consideration in the *Steelworkers Trilogy* and later decisions has been the rigid circumscription of opportunities to evade a promise to arbitrate through pre- or post-arbitration proceedings. That policy consideration is obviously disserved by the Court of Appeals' recognition and application of a constructive waiver doctrine under the circumstances herein. Moreover, even if such a doctrine is to be countenanced, this Court should set the applicable parameters. The Court of Appeals' decision rests on clearly fragile reasoning and runs counter both to the spirit of the *Trilogy* and to accepted pleading precepts. Resolution of this issue is significant to future application of §301.

## CONCLUSION

The Petitioners respectfully request the Court to issue a writ of certiorari to the Tenth Circuit Court of Appeals for review of its decision herein.

Respectfully submitted,

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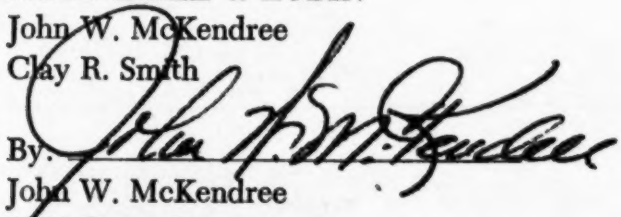
By: 
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